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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1963.

No. [redacted] 154

WILBUR J. FABRE,

Petitioner,

versus

RESERVE INSURANCE COMPANY,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF LOUISIANA

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TO THE CHIEF JUSTICE OF THE UNITED STATES AND THE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

Petitioner respectfully prays that a writ of *certiorari* issue to review the judgment of the Supreme Court of Louisiana, entered on January 14, 1963 (rehearing denied on February 18, 1963), reversing the judgment of the Louisiana Court of Appeal, First Circuit, and granting judgment against petitioner, who was defendant, on a basis

urged first in plaintiff's application for rehearing before said Court of Appeal.

Reserve Insurance Company had sued petitioner for damages, and had instituted this suit by means of a petition which, under established Louisiana jurisprudence, must be characterized as an action *ex delicto*, and not one *ex contractu*.

The District Court treated it as a tort action and awarded damages, rejecting petitioner's plea of prescription. On appeal, the Court of Appeal likewise, and properly, considered the claim to be one in tort, but maintained the plea of prescription.

Reserve applied for rehearing, and **for the first time**, and contrary to its consistent position urged theretofore, now alternatively claimed the action was *ex contractu*. Rehearing was denied and Reserve applied to the Louisiana Supreme Court for a writ of *certiorari*; which was granted.

The Louisiana Supreme Court held the action to be *ex contractu*, and reinstated the judgment of the District Court.

Petitioner applied for rehearing, pointing out that he had never had an opportunity to assert his defenses to any claim based on contract, inasmuch as trial in the District Court had raised only a tort claim.

The Louisiana Supreme Court denied rehearing on February 18, 1963.

OPINIONS BELOW

The judgment of the District Court, and the decision of the Louisiana Court of Appeal, are reproduced in Appendix 1. The opinion and judgment of the Louisiana Supreme Court reads as follows:

> "In the district court the plaintiff Reserve Insurance Company obtained a judgment for $1113.74 against the defendant Wilbur J. Fabre. On appeal the Court of Appeal, First Circuit, annulled and set aside this judgment, sustained a plea of prescription of one year, and dismissed the suit. See 140 So. (2d) 438. On application of plaintiff we granted certiorari.
>
> "The factual situation out of which this litigation arose is somewhat complicated, even involving an earlier lawsuit in which the plaintiff insurer was a party. This insurance company issued a collision insurance policy upon an automobile owned by Kenneth C. Cameron, who is not a party to the present suit. On July 15, 1956, the owner of the car, Cameron, loaned it to the defendant Wilbur J. Fabre. In using the car under this loan Fabre became involved in an accident which caused extensive damage to the automobile. Reserve Insurance Company refused to pay Cameron for the loss, and on September 22, 1956, he instituted suit in Lafayette Parish against the insurance company. Reserve Insurance Company, defendant in that suit, filed a third party petition against Fabre, a resident of St. Mary Parish, and caused him to be cited. Fabre excepted to the third party action on the ground

that the district court of Lafayette Parish was without jurisdiction over his person. In due course the case was appealed to this court. By decree which became final on April 27, 1959, this court affirmed the judgment of the district court which had sustained the plea to the jurisdiction filed by Fabre, and affirmed the judgment against Reserve Insurance Company; it dismissed plaintiff's claim against Calvert Fire Insurance Company, another defendant in that suit. See Cameron v. Reserve Ins. Co., 237 La. 433, 111 So. (2d) 336.

"On February 17, 1959, Reserve paid Cameron the amount due by it under this judgment, and, as Cameron's subrogee under the provisions of the policy, it instituted the present suit against Fabre on June 8, 1959, to recover $1113.74.

"To recapitulate, the facts show that the damage occurred to the automobile on July 15, 1956, that the amount due under the judgment subsequently rendered against Reserve was paid on February 17, 1959, and that the instant suit was instituted on June 8, 1959. Thus payment was made and the present suit filed much more than a year after the damage occurred. The present suit, however, was instituted less than a year after the judgment in the previous case became final.

"Both the district court and the Court of Appeal considered the instant suit to be one in tort under Article 2315 of the Civil Code, and the Court of Appeal in reversing the district court and sustaining the plea of prescription concluded that the plaintiff

here had no legal right in the prior suit to file the third party action upon which it now relies to interrupt prescription, saying that "consequently the filing of the third party action had no legal effect and could not serve to interrupt prescription" of one year. Moreover, plaintiff Reserve itself considered its action one in tort, and contended for the first time in its application for rehearing in the Court of Appeal that its action was contractual in nature, and that the prescription applicable was not the one-year prescription for offenses and quasi-offenses but was the prescription of 10 years for personal actions generally, under Article 3544. In this court both in argument and in brief plaintiff Reserve argues in the alternative that its action in the instant case is one *ex contractu.*

"To determine whether this is a suit in tort or one in contract we must examine the petition of plaintiff.

"The petition alleges in Paragraph 9, and this allegation is admitted, 'That the said Fabre, on July 15, 1956, borrowed from Cameron the Thunderbird automobile at Morgan City, Louisiana, and drove the same to Grand Isle * * *.'

"The evidence in the prior suit between Cameron and Reserve was introduced in evidence in this case, and it is clear from this evidence, as well as from the admitted allegation quoted above, that Cameron had loaned Fabre his automobile. Consequently there existed between Cameron and Fabre an agree-

ment of the sort which is designated in our Civil Code as a 'loan for use.'

"Article 2891 of the Civil Code provides:

"'There are two kinds of loans.

"'The loan of things, which may be used without being destroyed;

"'And the loan of things, which are destroyed without (by) being used.

"'The first kind is called loan for use or *commodatum*.

"'The second kind is called loan for consumption or *mutuum*.'

"Article 2893 defines the loan for use:

"'The loan for use is an agreement, by which a person delivers a thing to another, to use it according to its natural destination, or according to the agreement, under the obligation on the part of the borrower, to return it after he shall have done using it.'

"One of the obligations imposed upon the borrower for use is to keep and preserve the thing lent, as set forth in Article 2898:

"'The borrower is bound to keep and preserve, in the best possible order, the thing lent. He can use it only in the manner for which it is fitted by its nature, or which is allowed by the agreement, under the penalty of *damages*.' (Italics ours.)

"Fabre, the borrower, therefore, under penalty of damages, had to keep and preserve the automobile loaned for use. His negligence in the operation of the thing loaned, alleged in the petition and found by the trial judge to be sustained, constituted a breach of the obligation imposed by law upon the borrower, and consequently this is an action for reparation, which is prescribed in 10 years. Both the district court and the Court of Appeal therefore erred in considering plaintiff's suit one in tort prescribing in one year.

"The defendant insists, however, that this case must be considered one in tort because the petition in great detail outlines the negligence of the defendant and because the evidence submitted in support of the cause of action dealt exclusively with the question of the alleged negligence. It is true that the petition in Paragraph 12 sets out affirmatively the fault of the defendant thus: 'That the fault of the said Fabre, among other things, consisted of the following: * * *;' and there follows a detailed pleading of his negligence.

"This argument of the defendant overlooks the fact that the concept of fault is not confined to offenses and quasi-offenses under Article 2315. Planiol's discussion of the French Civil Code makes it clear that the concept of fault is not confined to matters delictual in his distinction between contractual and delictual fault:

"'An idea which has reigned sovereignly in all the French doctrine for more than fifty years is the dis-

tinction between delictual fault and contractual fault * * *. What does one understand from such words? Contractual fault is that which is committed on the occasion of the execution (inexecution) of a contract. It consists in violating a contractual obligation. As to the delictual fault, most authors say that it is "an act productive of obligations which takes place between persons juridically strangers to each other." Thus an essential difference separates these two kinds of fault: the contractual fault supposes the pre-existence of an obligation which is the inexecution thereof, while delictual fault supposes the absence of the obligation, and its result is the creation of one.' Planiol, Traite elementaire de droit civil, 11th ed. 1939 (La. State Law Institute Tr. 1959), Vol. 2, pt. 1, § 873, p. 485.

"The French commentator Laurent shows that the concept of fault is peculiarly applicable in the obligation to care for a thing borrowed. He says that because of the high degree of care required of the borrower he is held responsible for a slight or trivial fault. On the other hand, if there is no fault with which to reproach the borrower, he cannot be held responsible for damages to or loss of the thing borrowed. Laurent points out also that if an accident occurs which is ordinarily brought about by fault, the borrower must prove his lack of fault to be relieved of responsibility. 26 Laurent, Droit civil (3rd ed. 1878), nº 471, p. 477.

"Dalloz' discussion of the duty of care of the borrower toward the property and his liability for damage is in terms of fault also. 4 Dalloz, Codes

annotes, Nouveau code civil, art. 1880, § 1or (A), p. 678.

"Defendant contends also that the plaintiff has treated this as a case in tort and that under the authority of Importsales, Inc., v. Lindeman, 231 La. 663, 92 So. (2d) 574, it cannot now argue to the contrary. That case is authority for the proposition that when the relief available under the contract theory is different from the relief available under the tort theory and the petititioner in his prayer prays for the relief available under the tort theory, his case must be considered as governed by the prescription of one year under the rule that 'it is the well settled jurisprudence of this state that the character which plaintiff gives his pleading and the form of his action govern the prescription applicable.' In the case before us there is no distinction. The remedy available under Article 2898, as under Article 2315, is damages, and that is what plaintiff prayed for here.

"The defendant argues also that the prayer for legal interest conclusively characterizes the action as one in tort, but he fails wholly to substantiate this argument. A prayer for legal interest would appear to be equally as appropriate for damages under Article 2898 as for damages under Article 2315.

"The defendant both in the Court of Appeal and in this court relies on his plea of prescription of one year, which we have found not applicable; there is no issue between the parties on the merits of the case.

"For the reasons assigned the judgment of the Court of Appeal is annulled and set aside, and the judgment of the district court is reinstated and made the judgment of this court. Defendant-respondent is to pay all costs."

JURISDICTION.

Dates of decisions and judgments have been stated. The jurisdiction of this Court is invoked under 28th U. S. C. § 1257 (3) and the Fifth and Fourteenth Amendments to the United States Constitution.

QUESTIONS PRESENTED.

1. When State law requires detailed pleading from which it must be clear whether a claim is brought *ex delicto* or *ex contractu*, and a suit is prosecuted and defended in trial and appellate courts as one *ex delicto*, and decided by those courts on that issue, is a defendant who has thus not been able to present any defense on a claim in contract deprived of due process of law when the State Supreme Court issues writ of review and renders a money judgment against him on a holding that plaintiff's claim could be characterized as one *ex contractu*?

2. When Louisiana law provides specifically for interest from date of judicial demand only in claims *ex delicto*, the petition alleges defendant's negligence in detail and prays for such interest, when defendant pleads the one year statute of limitations applicable in tort cases, the issue is tried on the question of whether the one year had run, was decided adversely to defendant by the Dis-

trict Court and reversed on this point by the Louisiana Court of Appeal, after which plaintiff, in application for rehearing, for the first time suggests alternatively that his claim might be characterized as one *ex contractu*, is defendant deprived of due process of law when the Louisiana Supreme Court issues writ of review and holds plaintiff's claim to have been one *ex contractu*, subject to 10 year statute of limitations, and renders judgment against defendant without affording him opportunity to urge such defenses as he may have with respect to an action on contract?

STATUTES INVOLVED.

Louisiana Civil Code Articles 2159, 2160, 2161, 2315 and 2898 are reproduced in Appendix 2. While Louisiana now operates under a Code of Civil Procedure which became effective January 1, 1961, the former Louisiana Code of Practice applies here in part, and Articles 172 and 172.1 thereof likewise appear in Appendix 2.

STATEMENT OF THE CASE.

Reserve Insurance Company was the carrier for collision and upset for one Cameron and an automobile owned by him. On July 15, 1956, Cameron lent his car to Fabre, petitioner herein, a resident of St. Mary Parish, Louisiana, who wrecked it in Jefferson Parish.

Cameron made claim against Reserve, which refused to pay, so he filed suit against his insurer in Lafayette Parish, whereupon Reserve filed a third party petition against Fabre.

In response, Fabre excepted to the jurisdiction, was maintained, Reserve appealed to the Louisiana Supreme Court, which Court affirmed the decision by judgment which became final on April 27, 1959.

Reserve paid Cameron on February 17, 1959 and, as Cameron's subrogee, sued Fabre on June 8, 1959. This is the action here involved.

Fabre filed exception of prescription, alleging the claim "is extinguished by the prescription of one year."

Counsel for Reserve filed, on January 21, 1960, a brief in the District Court in this connection, in which he said:

> ". . . It is a fact that the claim of plaintiff herein is one growing out of Civil Code Article 2315, and consequently, suit must be brought within one year after the occurrence of the accident, unless prescription is interrupted by one of the procedures authorized by our laws."

The District Court gave judgment in favor of Reserve, with legal interest from date of judicial demand.

On appeal, the Court of Appeal reversed, sustaining the plea of prescription of one year.

The Louisiana Supreme Court opinion complained of herein states:

> "Both the district court and the Court of Appeal considered the instant suit to be one in tort under Article 2315 of the Civil Code. . . Moreover, plain-

t'ff Reserve itself considered its action one in tort, and contended for the first time in its application for rehearing in the Court of Appeal that its action was contractual in nature. . ."

Holding the claim to be one *ex contractu*, the Louisiana Supreme Court reinstated the judgment of the District Court for damages, together with interest from date of judicial demand.

Fabre filed application for rehearing, alleging he had been deprived of his right to present any defense to a claim *ex contractu*, and that his property was being taken without due process, contrary to Article 1, Section 2, of the Louisiana Constitution and the Fourteenth Amendment to the United States Constitution.[1]

Rehearing was refused on February 18, 1983.

REASONS FOR GRANTING THE WRIT.

Under established Louisiana jurisprudence a plaintiff who has elected to file his action in tort is barred from recanting, and from recovering on the basis of contract, and unless it is otherwise clear from his petition, a prayer for interest from date of judicial demand is the best indication that his suit is one in tort. *Imporsales, Inc., v. Lindeman*, 231 La. 663, 92 So. (2d) 574.

The very decision of the Louisiana Supreme Court herein complained of expressly acknowledges that in both the District Court and the Court of Appeal, Reserve had urged, and Fabre had defended against, a suit in tort.

[1] See appendix 3 for full text.

Thus, defendant had no opportunity to assert any defense to an action based upon contract until the Louisiana Supreme Court found that both litigants and both lower Courts had been in error and that the claim was in reality based upon contract.

By then it was too late for defendant to offer evidence with respect to any claim in contract.

Your petitioner has been cast for a money judgment under an alleged contract without ever having been afforded an opportunity to assert any defense to a claim based upon contract.

He has thus been denied due process of law, contrary to the Fourteenth Amendment to the United States Constitution. *Kansas, Ex. Rel. Beck v. Occidental Life Ins. Co.*, 95 F. (2d) 935, cert. den. 305 U. S. 603, 59 S. Ct. 63; *Barry v. Hall*, 98 F. (2d) 222, and authorities cited therein.

CONCLUSION.

The issues here sought to be raised are of such constitutional import, and can well affect the property of so many citizens, that *certiorari* should issue.

Respectfully submitted,

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Lafayette, Louisiana.
By J. Minos Simon.

CERTIFICATE OF SERVICE.

Copies of the foregoing petition for *certiorari* have been mailed to Mr. Donald Labbe, attorney for Reserve Insurance Company, and Honorable Val J. Courville, Clerk, Louisiana Supreme Court.

Lafayette, Louisiana, May , 1963.

J. MINOS SIMON.

APPENDIX 1.

JUDGMENT OF THE DISTRICT COURT.

This matter was submitted for adjudication on the stipulations of the attorneys for plaintiff and defendant.

In the opinion of the Court, there is no doubt that defendant Fabre's gross negligence was the sole, proximate cause of the accident, and that he is liable to plaintiff herein.

IT IS, THEREFORE, ORDERED, ADJUDGED AND DECREED that there be JUDGMENT herein in favor of plaintiff, Reserve Insurance Company, and against defendant, Wilbur J. Fabre, for the sum of ONE THOUSAND ONE HUNDRED THIRTEEN AND 74/100 ($1,113.74) DOLLARS, with interest thereon at the rate of five percent per annum from June 6, 1960, until paid, and all costs.

DECISION, LOUISIANA COURT OF APPEAL.

The petitioner, Reserve Insurance Company, filed this suit against the defendant, Wilbur J. Fabre, in subrogation for reimbursement of damages paid by petitioner to its assured under a collision insurance policy. The claim is based upon a subrogation rights as contained in the said policy. The defendant filed an exception of one year prescription which was overruled by the lower Court, and judgment was rendered in favor of petitioner and against defendant in the amount claimed. The defendant has taken this appeal.

The record discloses that petitioner insurance company wrote a collision insurance policy upon an automo-

bile owned by Kenneth C. Cameron. On or about July 15, 1956, the defendant herein was driving the automobile with Cameron's permission, when he was involved in an accident. The accident, as well as the resulting damages, were caused solely by the negligence of defendant. A dispute arose between Mr. Cameron and the petitioner insurance company relative to the liability of petitioner, which resulted in a suit against the petitioner by Cameron wherein he seeked (sic) to recover for the total loss of his automobile. The present defendant was called into said suit by petitioner as a third party defendant. The defendant filed an exception to the jurisdiction, which exception was maintained by the Lower Court. The matter went to the Supreme Court where the exception to jurisdiction was finally maintained in its opinion reported in *237 La. 443, 111 So. (2d) 336.* In the meantime, on February 17, 1959, the petitioner paid Mr. Cameron the amount of damages called for by the judgment. The petitioner then filed this suit against the present defendant for reimbursement of the damages so paid. The defendant's exception of prescription was overruled by the Lower Court and judgment was awarded in favor of petitioner and against defendant. The defendant has taken this appeal.

There is no dispute between the parties to this matter that, in the absence of the filing within one year from the date of the accident of a third party petition, the action is barred by the prescription of one year. This prescription is set forth under the provisions of Article 2315 of the Louisiana Civil Code, as the right of the insurer in subrogation is a right in tort: *Lumberman's Mutual Ins. Co. v. Ruiz*, 77 So. 2d 84. The problem presented to

us is whether under the facts peculiar to this case the filing of the third party petition interrupted prescription as against the defendant. Defendant contends that prescription was not interrupted by the filing of the third party petition. There is no question but that under the provisions of Article 2518 of the Louisiana Civil Code a legal interruption takes place by the citation of a defendant even though the Court wherein the action is pending is without jurisdiction. The defendant, however, takes the position that at the time of the third party petition by petitioner, the petitioner had no cause of action as against the defendant. At that time the petitioner had paid no damages to the owner of the vehicle, and therefore it had not been subrogated to any claim as against the defendant. The right of subrogation did not arise until some two years following the date of the accident, when the damages were paid by the petitioner. Upon payment of these damages, the petitioner became subrogated to any rights which its assured may have had against the defendant. It was not until this time that a cause of action arose in favor of petitioner as against the defendant. In support of its position, the defendant cites Lamport, Inc., v. Tepper, 3 FRD 49, wherein the Federal Court held that in order to invoke the third party practice act a party "must, as a condition precedent thereto, state facts sufficient to constitute an existent cause of action." In that case, the defendant filed a third party action upon a guaranty contract under which the third party defendant agreed to make contribution to the extent of one-half of whatever the third party plaintiff may be ordered to pay to the original plaintiff. The Court dismissed the third party action because of the fact that the third party plaintiff did not allege that it had made pay-

ment. The liability of contribution did not and could not arise until after payment was made by the third party plaintiff to the plaintiff.

The same situation is true in the case at bar. At the time petitioner filed the third party petition against the defendant it did not have a cause of action against defendant as it had not then made any payment to its assured under the provisions of its insurance policy. Inasmuch as it did not become subrogated to its insured's cause of action against defendant until payment, its cause of action against defendant did not arise until some three years after the collision, or some two years after it filed the third party action. Therefore, petitioner had no legal right to file the third party action upon which it now relies to interrupt prescription, and consequently the filing of the third party action had no legal effect and could not serve to interrupt prescription. The Courts of this State have held that subrogation means substitution. Under this doctrine the subrogee is placed in the position of his subrogor, and does not acquire any greater right than that possessed by the subrogor. *Motor Ins. Corp. v. Employers' Liability Assur. Corp., 52 So. 2d 311.* We feel therefore that the Lower Court erred in overruling the exception of prescription.

For the reasons assigned, the judgment of the Lower Court will be reversed and there is judgment herein in favor of defendant and against petitioner maintaining defendant's exception of prescription and dismissing petitioner's action, all costs to be paid by petitioner.

JUDGMENT REVERSED.

APPENDIX 2.

LOUISIANA STATUTES.

Civil Code Article 2159:

Subrogation to the right of a creditor in favor of a third person who pays him, is either conventional or legal.

Civil Code Article 2160:

The subrogation is conventional:

1. When the creditor, receiving his payment from a third person, subrogates him in his rights, actions, privileges, and mortgages against the debtor; this subrogation must be expressed and made at the same time as the payment.

2. When the debtor borrows a sum for the purpose of paying his debts, and intending to subrogate the lender in the rights of the creditor. To make this subrogation valid, it is necessary that the act of borrowing and the receipt be executed in presence of a notary and two witnesses; that, in the act of borrowing, it be declared that the sum was borrowed to make the payment, and that in the receipt it be declared that the payment has been made with the money furnished for that purpose by the new creditor. That subrogation takes place independently of the will of the creditor.

Civil Code Article 2161:

Subrogation takes place of right:

1. For the benefit of him who, being himself a creditor, pays another creditor, whose claim is pre-

ferable to his by reason of his privileges or mortgages.

2. For the benefit of the purchases of any immovable property, who employs the price of his purchase in paying the creditors, to whom this property was mortgaged.

3. For the benefit of him who, being bound with others, or for others, for the payment of the debt, had an interest in discharging it.

4. For the benefit of the beneficiary heir, who has paid with his own funds the debts of the succession.

Civil Code Article 2315:

Every act whatever of man that causes damage to another obliges him by whose fault it happened to repair it.

The right to recover damages to property caused by an offense or quasi offense is a property right which, on the death of the obligee, is inherited by his legal, instituted, or irregular heirs, subject to the community rights of the surviving spouse.

The right to recover all other damages caused by an offense or quasi offense, if the injured person dies, shall survive for a period of one year from the death of the deceased in favor of: (1) the surviving spouse and child or children of the deceased, or either such spouse or such child or children; (2) the surviving father and mother of the deceased, or either of them, if he left no spouse or child sur-

viving; and (3) the surviving brothers and sisters of the deceased, or any of them, if he left no spouse, child, or parent surviving. The survivors in whose favor this right of action survives may also recover the damages which they sustained through the wrongful death of the deceased. A right to recover damages under the provisions of this paragraph is a property right which, on the death of the survivor in whose favor the right of action survived, is inherited by his legal, instituted, or irregular heirs, whether suit has been instituted thereon by the survivor or not.

As used in this article, the words "child", "brother", "sister", "father", and "mother" include a child, brother, sister, father, and mother, by adoption, respectively. (As amended Acts 1960, No. 30 § 1.)

Civil Code Article 2898:

The borrower is bound to keep and preserve, in the best possible order, the thing lent. He can use it only in the manner for which it is fitted by its nature, or which is allowed by the agreement, under the penalty of damages.

Code of Practice Article 172:

The petition must be drawn in the English language, and it must mention:

1. The name or title of the court to which it is addressed.

2. The name, surname and place of residence of the plaintiff.

3. The name and the place of residence of the defendant, or the place where he lives.

4. The petition must contain a clear and concise statement of the object of the demand, as well as of the nature of the title, or the cause of action on which it is founded.

5. It must not contain any insulting or impertinent expression.

6. It must end by conclusions analogous to the nature of the action to which the plaintiff has resorted.

7. It must be signed by the plaintiff or his attorney in fact, or by his advocate.

Code of Practice Article 172.1:

In the conduct of civil causes in the district courts of this state other than appeal from justice of the peace courts, the following rules of practice shall be observed and enforced, to wit:

PETITION OF PLAINTIFF

First: The plaintiff in his petition shall state his cause of action articulately, that is to say, he shall, so far as practical, state each of the material facts upon which he bases his claim for relief in a separate paragraph, separately numbered. The petition shall be in all cases verified as hereinafter provided.

APPENDIX 3.

The application for rehearing to the Supreme Court of Louisiana follows:

Wilbur J. Fabre, appearing through counsel, complaining of the judgment of this Court dated January 14, 1963, moves the Court to grant a rehearing herein in order to correct the following errors committed by the Court.

ERROR NUMBER 1.

It was error for the Court to allow plaintiff to recover against defendant on a cause of action not alleged and in connection with which no citation ever issued.

(a) At the time the cause of action alleged was filed Article 172 of the Louisiana Code of Practice applied, which provided in part:

4. "The petition must contain a clear and concise statement of the object of the demand, as well as of the **nature** of the title, or the cause of action **on which it is founded.**",

(b) Article 172.1 of the Louisiana Code of Practice at the time this suit was filed provided:

"First: The plaintiff in his petition shall state his cause of action articulately, that is to say, he shall, so far as practical, state each of the material facts upon which he bases his claim for relief in a separate paragraph, separately numbered."

(c) Plaintiff clearly and exclusively stated a cause of action sounding in tort. Not once did the plain-

tiff state that defendant had breached the terms of any agreement between defendant and Cameron, owner of the vehicle, which allegation is an indispensable element in connection with the cause of action for breach of contract.

(d) The stipulation referred to by the Court whereby defendant agreed that in the event judgment was rendered in favor of plaintiff the amount of recovery would be One Thousand One Hundred Thirteen and 74 100 Dollars ($1113.74) plus five percent (5%) per annum interest from the date suit was filed related exclusively to an action ex delicto.

(e) Plaintiff repeatedly has expressly and unconditionally admitted and confessed that the cause of action which it intended to institute and which it had instituted and was pursuing was one controlled by the prescription of one year as provided for by the provisions of Article 2315 of the Louisiana Civil Code and therefore said plaintiff did freely and expressly elect to bring against defendant by its lawsuit only an action *ex delicto* and not an action *ex contractu*; this lawsuit, therefore, presented to this Court no justiciable controversy as to whether or not the lawsuit at bar was an action in tort or for breach of contract.

(f) The prevailing law at the time this suit was filed on the question at bar is exemplified by *South Louisiana Land Company, Ltd., v. Riggs Cypress Company, Ltd.*, 119 La. 193, 43 So. 1003, in which plaintiff made the identical attempt to change his cause of action as attempted by plaintiff at bar,

from a jactitory action to a petitory action, and unlike plaintiff at bar supported his attempt by appropriate allegation but this Court rejected the effort and held "the action must stand or fall as originally brought."

ERROR NUMBER 2.

There is no evidence whatever in the record of this cause developing or describing the terms of the agreement of use between defendant and Cameron, owner of said vehicle.

ERROR NUMBER 3.

Defendant has a defense to offer to an action ex contractu, on which he has never been called upon to defend, and unless this cause is remanded for the purpose of granting to defendant an opportunity to be heard the judgment rendered by this Court and complained of herein will operate to deprive defendant of his property without due process, in violation of Article 1, Section 2 of the Constitution of Louisiana and the Fourteenth Amendment to the Constitution of the United States.